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Lerner

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-195747

DATE: May 2, 1980

MATTER OF: Hein-Werner Corporation

DIGEST:

Protest alleging contracting officer unreasonably determined offers would be received from sufficient number of small business concerns is denied where record indicates that eleven small business firms were on mailing list which was ultimately expanded to twenty-eight, and bids from several small businesses were received in two prior procurements.

Protest of

Hein-Werner Corporation (Hein-Werner) protests the ~~Department of the Army's decision to set aside invitation for bids (IFB) No. DAAB09-79-B-4633~~ for small businesses. Hein-Werner asserts the contracting officer unreasonably determined bids would be received from a sufficient number of responsible small business concerns so that the contract would be awarded at a reasonable price.

The IFB solicited bids on a minimum of 2,683 and a maximum of 8,049 ten-ton hydraulic dolly jacks. As in previous solicitations for these items, the procurement was a total small business set-aside. The IFB was sent to 28 bidders including Hein-Werner. (Since 1968 Hein-Werner had received nine out of ten contracts awarded by the Army for ten-ton hydraulic jacks, and until recently qualified as a small business concern.)

Prior to bid opening, Hein-Werner informed the contracting officer that it was no longer a small business and therefore was ineligible to compete under the IFB.

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Hein-Werner further advised the contracting officer that, in its opinion, only a regular manufacturer of ten-ton jacks could reasonably be expected to satisfactorily perform the contract and hence be responsible. Since Hein-Werner believed that only one small business manufacturer existed, Hein-Werner urged the contracting officer to amend the IFB to permit bids to be submitted by firms which did not qualify as small business concerns. The contracting officer, however, refused to do so and thereafter Hein-Werner filed its protest with our Office.

Bids from three small businesses were received. The low bidder, Weaver Jack Corporation (Weaver Jack) was determined to be responsible and was awarded the contract notwithstanding the pending protest because the agency determined pursuant to Defense Acquisition Regulation (DAR) § 2-407.8(b)(3)(iii) (1976 ed.) that prompt award would be advantageous to the Government.

Hein-Werner asserts that "[i]n the past several years only one small business concern other than Hein-Werner has manufactured ten-ton hydraulic service jacks." Hein-Werner further asserts that due to the complex design and large quantity required to be delivered under the contract "it is extremely unlikely that a small business concern which is not already a manufacturer of hydraulic service jacks can adequately perform this contract." In this regard, Hein-Werner contends the minimum purchase amount of 2,683 is "roughly 62 percent of the entire industry's 1978 production of both ten and twenty-ton service jacks" and that the maximum purchase of 8,049 is "almost twice the industry's 1978 production." Hein-Werner states the purchase is "by far the largest Army procurement of ten-ton hydraulic service jacks which has ever been contemplated." Hein-Werner further alleges that the one contract it did not receive was awarded to a small business which is not ordinarily a manufacturer of these items and the firm was unable to satisfactorily perform the contract. Under these circumstances, Hein-Werner argues, the contracting officer acted unreasonably in setting the procurement aside for small businesses and should have amended the IFB to permit it to submit a bid once it brought the above facts to the Army's attention.

The Army denies the contracting officer acted unreasonably in deciding to set aside the procurement. The Army states that the "[c]ontracting officer had eleven small business sources on his original mailing list, which was ultimately expanded to twenty-eight

sources." The Army further indicates it received bids from two small businesses in 1976, five in 1977, and four in 1978, and consequently there was no reason for the contracting officer to think the same would not be true for this procurement. In this regard, the Army notes it received three bids from small businesses under the subject IFB, two of which were reasonable, and further advises that award was made to a small business, Weaver Jack.

At the time the IFB was issued, DAR § 1-706.5(a) (1976 ed.) provided that a procurement shall be set aside for small businesses "if the contracting officer determines there is a reasonable expectation that offers will be received from a sufficient number of responsible small business concerns so that award will be made at reasonable prices."¹ A determination under the cited regulation that adequate competition reasonably may be anticipated is basically a business judgment and we will not substitute our judgment for that of the contracting officer absent a clear showing of abuse of discretion. See Otis Elevator Company, B-195831, November 8, 1979, 79-2 CPD 341, and cases cited therein.

We believe the contracting officer reasonably determined that bids from a sufficient number of responsible small business concerns would be received. The record indicates that the contracting officer had eleven small business firms on his original mailing list and that the IFB was ultimately sent to twenty-eight firms. Additionally, the record further indicates bids from several small businesses had been received under the two most recent procurements of the items in question. Even if

¹Subsequently, the wording of this provision was changed by Defense Acquisition Circular 76-19, July 27, 1979. The regulation now requires an expectation of offers from "at least two responsible small business concerns offering the products of different small business concerns" and provides that once an item has been successfully acquired through a small business set-aside, all future requirements are to be set aside unless the contracting officer determines there is not a reasonable expectation that offers from two responsible small businesses will be received and award will be made at a reasonable price.

we assume, as Hein-Werner argues, that only one small business manufacturer capable of performing the contract existed, the regulation in effect at the time the IFB was issued required only that bids from at least two responsible small businesses could be anticipated. In other words, so long as there was one responsible small business manufacturer and at least one responsible small business distributor which could be expected to compete, the contracting officer could set aside the procurement under the regulation in effect at the time the IFB was issued. Moreover, nothing in the regulation required the contracting officer to withdraw the set-aside prior to receipt of bids which would indicate whether the requisite competition was attained.

Finally, as Hein-Werner acknowledges the existence of at least one small business manufacturer (the awardee), and has not established that none of the firms cited by the contracting officer could supply the items in question, we do not believe that the contracting officer's decision to retain the set-aside upon receipt of the advice provided by Hein-Werner was unreasonable.

The protest is denied.



Acting Comptroller General
of the United States